98-85 (10)

No. ~~97-895~~

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

JAMES B. HUNT, JR., *et al.*,

Appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

MOTION OF ALFRED SMALLWOOD, DAVID MOORE, WILLIAM M. HODGES, ROBERT L. DAVIS, JR., JAN VALDER, BARNEY OFFERMAN, VIRGINIA NEWELL, CHARLES LAMBETH, AND GEORGE SIMKINS (CURRENTLY DEFENDANT-INTERVENORS IN THE COURT BELOW) TO INTERVENE AS APPELLANTS IN THIS COURT

Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins ("Applicants"), by their undersigned attorneys, respectfully move this Court for leave to intervene as appellants in the above-captioned action, so that they may protect their interests (which have been recognized by the court below in permitting their intervention as of right as defendant-intervenors below following entry of the order under review on this appeal) in sustaining the constitutionality of the Twelfth Congressional District. As grounds for this motion, Applicants state the following:

1. Applicants are white and black registered voters residing in either North Carolina's Twelfth Congressional District (as reconfigured in the legislature's 1997 plan) or its First Congressional District.

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2. On July 9, 1996, appellees filed their complaint in this case. Days later, on July 11, 1996, Applicants sought to intervene in this suit as defendants. On November 26, 1997, after the district court failed to rule, Applicants renewed their motion to intervene. Appellees did not respond to either motion.

3. As of the March 31, 1998 hearing on cross-motions for summary judgment and request for preliminary injunction, the district court had not ruled on the motions to intervene, then pending for over twenty months and four months respectively; instead the court issued its permanent injunction and granted summary judgment without ruling on the unopposed motions or holding a hearing on intervention. In fact, the district court rebuffed counsel for Applicants' attempt to bring the motion to intervene to the Court's attention and expressly denied counsel for Applicants an opportunity to speak at the March hearing.

4. On April 3, 1998, the United States District Court for the Eastern District of North Carolina issued an order granting summary judgment to plaintiffs, declaring North Carolina's Twelfth Congressional District unconstitutional, permanently enjoining elections under the 1997 congressional redistricting plan, and ordering the State of North Carolina ("State") to submit a schedule for the General Assembly to adopt a new redistricting plan and to hold elections under that plan.[1] The Court issued its judgment on April 6, 1998.[2] Following the district court ruling, Applicants filed an *amicus curiae* memorandum in this Court, bringing to the Court's attention additional reasons why a stay of the district court's April order was essential.

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[1] *See Cromartie v. Hunt*, No. 4:96CV104-BO(3) (E.D.N.C. April 3, 1998) (order and permanent injunction), attached to Jurisdictional Statement at Appendix 45a.

[2] *See* Judgment of United States District Court for the Eastern District of North Carolina, April 6, 1998, attached to Jurisdictional Statement at Appendix 49a.

5. On May 26, 1998, with the two prior intervention motions still pending, Applicants filed a *third* motion to intervene as defendants in the case. On June 20, 1998, after the deadline for filing a timely notice of appeal of the district court's April 3rd order and April 6th judgment, the district court ruled that the Applicants were entitled to intervene as of right in this action.

6. This Court has permitted individuals to intervene in cases on appeal to the Supreme Court in order to protect their interests, regardless of whether they were parties or intervenors below, so long as their interests are truly at stake. In *United States v. Terminal Railroad Association*, 236 U.S. 194, 199 (1915), the Court permitted parties denied intervention below to intervene on appeal to this Court so that they could seek modification of a decree "in so far as it might operate prejudicially to their rights." *See also Eastern-Central Motor Carriers Association v. United States*, 321 U.S. 194, 198-99 n.5 (1944) (Court permits intervention to organization that did not appear before three-judge district court below); *Labor Board v. Acme Industrial Co.*, 384 U.S. 925 (1966), 385 U.S. 432 (1967) (Court grants union's motion to intervene in Supreme Court appeal).

7. The delay in granting Applicants' motions to intervene prevented Applicants from fully participating as parties in the district court and prevented them from being able to exercise their right to appeal. Indeed, the court's delay in ruling on the motions to intervene and the timing of the subsequent grant of the motions to intervene were de facto denials, seriously prejudicing their rights below. Moreover, by refusing to rule on Applicants' motions, the district court placed Applicants in the position of being unable to either appeal the court's decision on the merits or appeal a denial of any of their motions to intervene.

8. As defendant-intervenors below, Applicants have a continuing interest in the

disposition of this litigation and the appeal of this case in this Court. The lower court decision and the ultimate disposition of this appeal will vitally affect their interests. This is why numerous courts, following *Shaw v. Reno*, 509 U.S. 630 (1993), have granted intervention to voters similarly situated to Applicants to defend challenges to redistricting plans, including in cases which have later proceeded to this Court on appeal. *See, e.g., Vera v. Richards*, 861 F. Supp. 1304, 1310 (S.D. Texas 1994), *aff'd*, 577 U.S. 952 (1996); *Johnson v. Miller*, No. CV 194-008, Order dated March 30, 1994 (S.D. Ga.). Indeed, Applicants have had a continuous interest in this case. These Applicants sought and were allowed to intervene as of right as party defendants in *Shaw v. Hunt*, No. 92-202-CIV-5 (Order, September 7, 1993), the predecessor to this action. Applicants participated fully in every stage of that case in the trial court and in this Court, including oral argument and also the remedial proceedings which resulted in the approval of the State's 1997 remedial plan.

9. Even before Applicants were allowed to participate as parties in this case, they filed pleadings throughout the litigation, including the summary judgment and preliminary injunction phases of the litigation, and appeared at the hearing on these issues in March 1998.

10. As in *Shaw v. Hunt*, Applicants seek to intervene in this case to protect their interest in defending the constitutionality of District 12 and, if necessary, to assert their rights under the U.S. Constitution and the Voting Rights Act. As in *Shaw*, if granted intervention on appeal in this Court, Applicants are prepared to follow the briefing schedule already set by the Court and coordinate their appeal with the State to avoid duplication of arguments.

WHEREFORE, Applicants pray that their motion to intervene be granted.

Respectfully submitted,

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No. 97-893

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CERTIFICATE OF SERVICE

I, Todd A. Cox, a member of the Bar of this Court, hereby certify that on this 2nd day of October, 1998, served by first-class mail, postage prepaid, a true and correct copy of the Motion of Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth, and George Simkins (Currently Defendant-Intervenors in the Court Below) to Intervene as Appellants in this Court to Robinson O. Everett, Suite 300 First Union National Bank Building, Post Office Box 586, Durham, North Carolina 27702 and Edwin M. Speas, Jr., Chief Deputy Attorney General and Tiare B. Smiley, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629, counsel for all of the appellants and appellees herein. I further certify that all parties required to be served have been served.

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